

FEDERAL VIEW OF UECA

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Sources of EPA Authority to Enter Into UECA Covenant

- Section 104(a) of CERCLA
 - “...President is authorized to act, consistent with NCP, [in addition to conducting removal and remedial actions] or take any other response measure consistent with the NCP which the President deems necessary to protect public welfare or the environment. . . .”

UECA PROVISIONS RELATIVE TO CERCLA

- Section 2 of Uniform Act defines an “environmental response project” with reference to a federal or state program “governing environmental remediation of real property.”
- [State is to insert state statutory references]
- Ohio statute, Sec. 5301.80 definition of ERP includes reference to fed. CERCLA and RCRA provisions.

FEDERAL GOVERNMENT ENTITIES

**MUST LOOK TO
THEIR OWN SOURCES
OF AUTHORITY IN ORDER
TO ENTER INTO
A UECA COVENANT**

EPA CERCLA DELEGATIONS

- **HQ Delegation 14-2 delegates the statutory authority under CERCLA Sec. 104 and provides authority to respond to any release pursuant to the NCP.**
- **Regional delegations are generally to the head of the Superfund program office. This individual would have authority to sign a UECA covenant.**

SECTION 104(j) COMPLIANCE

- Sec. 104(j) sets forth the standards for the acquisition of “any interest in real property.”
- Section 3 of UECA states that the right of an agency conducting an environmental response project, unless the agency is a “holder” (grantee) of the covenant, is not an interest in real property.

STRUCTURE OF UECA COVENANTS WHERE EPA IS A PARTY

- Owner = Titleholder of record to property where interest is to be conveyed.
- Holder= Similar to grantee in common law real property instrument; however, under UECA, the owner and holder can be the same party.
- EPA= Will probably be the environmental agency which “determines or approves” the environmental response project, and is a necessary party for the covenant to be effective.

ACCESS RIGHTS

- Section 4 of UECA states that a covenant may provide for rights of access to the property granted in connection with implementation or enforcement of the covenant.
- Skinner Landfill covenant provides access rights to EPA and the Generator PRPs, who are conducting the remedy under an RA CD. Referred to as “Access Grantees” in Covenant.

MONITORING OF THE COVENANT

- Sec. 4 of UECA states that a covenant may provide for periodic monitoring describing compliance with the covenant.
- This provision is only as good as the owner's commitment to do the periodic monitoring. I have usually opted to have generator PRPs add monitoring duties as an amendment to site O&M plan.

IMPLEMENTATION PITFALLS

- Abandoned Sites
 - Make Sure that Site Really Abandoned
 - Utilize PRP Search Activities to Locate Last Known Owners of Record, or Stockholders of Defunct Corporations
 - Look at the Corporate Winding Up Statute in Your State
 - Consider use, with HQ consultation, of issuing a UAO to require culpable parties with putative interests in a site to enter into a UECA covenant.
 - Negotiate foreclosure with State or local government.

OLD OWNERS IN OHIO

- Last Surviving Stockholder of Defunct Corporation, which was the titleholder of record, died before UECA covenant could be executed.
- Possible Approaches—
 - Enter into AOC with Stockholder's Daughter as "Survivor" under Ohio Corporate winding up statute.
 - *In rem* action in Federal court.

OLD OWNERS IN OHIO (cont'd)

- Owner, who had clear duty under CD to enter into interest restricting property, and who had received UECA covenant for execution, conveyed property to *inter vivos* trust.
- EPA and cooperating Generator PRPs had to have Owner execute covenant twice, first in her individual capacity, and then as trustee of her *inter vivos* trust.
- Lots of twists and turns when you're dealing with human beings!!